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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Dennis Montoya, individually and on  
on behalf of those similarly situated, ) No. CV-13-8068-PCT-SMM  
Plaintiff, )  
vs. )  
3PD, Inc., The Home Depot, Inc., et al., )  
Defendants. )

## **MEMORANDUM OF DECISION AND ORDER**

3PD, Inc.,  
Third-Party Plaintiff,  
vs.  
Big Dog Trucking and Material Handling,  
LLC,  
Third-Party Defendant.

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Pending before the Court is Defendant 3PD, Inc.’s (“3PD”) motion for partial summary judgment on three claims—that Plaintiff Dennis Montoya (“Montoya”) is not entitled to overtime compensation under the Fair Labor Standards Act (“FLSA”), that 3PD properly paid Montoya his minimum wage, and that Montoya has not stated an unjust enrichment claim. (Docs. 77-88.) 3PD’s motion is fully briefed. (Docs. 129-133.) The Court will follow its Initial Case Management Order and only rule on 3PD’s objection to Montoya’s overtime compensation claim and to the unjust enrichment claim. (Doc. 57 at 2.) Per the Initial Case Management Order, the Court will defer its ruling on Montoya’s

1 minimum wage claim at this time.<sup>1</sup> (*Id.*) After due consideration, the Court will grant 3PD's  
 2 motion for partial summary judgment finding that Montoya is not entitled to overtime  
 3 compensation and that Montoya does not state a claim for unjust enrichment.

4 **BACKGROUND**

5 Plaintiff Montoya on behalf of himself and all others similarly situated filed a class  
 6 and collective action complaint alleging that Defendant Home Depot and Defendant 3PD  
 7 violated the FLSA's minimum wage and overtime compensation provisions and Arizona  
 8 wage laws by misclassifying non-exempt hourly delivery driver employees as independent  
 9 contractors. (Doc. 1.) Subsequently, Montoya filed a First Amended Class and Collective  
 10 Action Complaint. (Doc. 33.) After the Court scheduled a Fed. R. Civ. P. 16 Preliminary  
 11 Pretrial Conference (Doc. 40), the parties met, conferred, and filed a Rule 26(f) Case  
 12 Management Plan (Doc. 49). In their proposed joint case management plan, all of the parties  
 13 submitted different proposals regarding management of this case. (Doc. 49.)

14 At the Rule 16 conference, the Court determined that it would resolve certain legal  
 15 issues raised by Defendants before turning to the issues of class certification. (Docs. 57, 63.)  
 16 Subsequently, Home Depot filed a summary judgment motion on the issue of whether it was  
 17 a joint employer of Montoya (Docs. 89, 90) and 3PD filed a partial summary judgment  
 18 motion on whether the FSLA's Motor Carrier exemption preempted Montoya's claim for  
 19 overtime compensation and whether Montoya stated an unjust enrichment claim (Docs. 77-  
 20 88). The Court found that Home Depot was not Montoya's joint employer. (Doc. 110.) The  
 21 Court now finds that 3PD is exempted from paying Montoya overtime compensation due to  
 22 the FLSA's Motor Carrier exemption, 29 U.S.C. § 213(b)(1), and that Montoya fails to state  
 23 an unjust enrichment claim.

24 Plaintiff Montoya is a delivery driver, who entered into a Delivery Service Agreement

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26       <sup>1</sup>The Court's Initial Case Management Order stated: **IT IS FURTHER ORDERED**  
 27 that Defendant 3PD shall file a motion for summary judgment regarding *applicability of the*  
*FLSA/motor carrier exemption and unjust enrichment* by Friday, January 10, 2014.  
 28 (emphasis added). (Doc. 57 at 2.)

1 (“DSA”) on behalf of Big Dog Trucking and Material Handling, LLC, (“Big Dog”) with  
2 Defendant 3PD on December 7, 2009. (Doc. 34 at 21; Doc. 34-1 at 2-20.) Montoya was the  
3 sole member and owner of the LLC. (Id.)

4 3PD is a Georgia based logistics company providing interstate property broker and  
5 freight forwarder services under authority granted by U.S. Dept. of Transportation Federal  
6 Motor Carrier Safety Administration (“FMCSA”). (Doc. 79-1 at 2, Declaration of Kent  
7 Ferris, Director of Remote Operations for 3PD.) 3PD does not perform the actual  
8 transportation, delivery, or installation of its customers’ goods. (Id.) Instead, 3PD contracts  
9 with FMCSA-licensed motor carriers that provide the trucks and labor necessary to  
10 accomplish these services. (Id.) Under Big Dog’s contract with 3PD, Montoya was to make  
11 deliveries for Home Depot’s store in Kingman, Arizona. (Id.)

12 The appliances sold by the Home Depot store in Kingman were manufactured at a  
13 variety of locations across the United States and Mexico, including Iowa (Maytag), Indiana  
14 (Whirlpool), Ohio (Whirlpool), Kentucky (Whirlpool), Arkansas (Whirlpool), Minnesota  
15 (Frigidaire), and Mexico (LG, GE ). (Doc. 87 at 2, Declaration of Bryan Ward, Director of  
16 Logistics for Home Depot.) Home Depot sells windows manufactured by Pella in Iowa and  
17 Illinois, and flooring manufactured by Pergo in North Carolina. (Id.)

18 Depending on the type of goods sold and the geographic market area (either remote  
19 or metropolitan) where the sales occur, the goods sold may: (1) move directly from the  
20 manufacturers to retail stores owned by Home Depot, (2) move from the manufacturers to  
21 Rapid Deployment Centers (“RDCs”) that Home Depot owns and operates throughout the  
22 United States, Canada, and Mexico for inventory control, (3) move from the manufacturers  
23 to third-party logistics providers’ facilities, or (4) from retail store to retail store. (Id.)

24 The Home Depot in Kingman is classified as a remote store. (Doc. 86 at 3,  
25 Declaration of Jim Waters, former Senior Manager at Home Depot over direct to customer  
26 delivery platforms, including store to customer appliance delivery and special order door and  
27 window network.) Home Depot remote stores like Kingman carry a limited amount of  
28 appliances, windows, and flooring in stock for sale to retail customers. (Id.) When a

1 customer purchases an appliance not in stock, Home Depot sends an electronic order to the  
2 manufacturer. (*Id.*) For a remote store like Kingman, purchased appliances are shipped from  
3 the manufacturers directly to the stores where the appliances were purchased for pick up by  
4 third-party logistics providers such as Montoya for delivery to the Home Depot retail  
5 customer. (*Id.*) When a customer purchases windows or flooring not in stock at a remote  
6 store, Home Depot sends an order to the manufacturer for the purchased windows or flooring  
7 and purchased windows and flooring are shipped from the manufacturers directly to the store  
8 where they were purchased for pick up by third-party logistics providers for delivery to the  
9 Home Depot customer. (*Id.* at 3-4.)

10 According to Mr. Ward, it is Home Depot's intent that the appliances, windows, and  
11 flooring that Home Depot purchases from the manufacturers move from the manufacturers'  
12 facilities to its stores and RDCs for delivery to Home Depot retail customers. (Doc. 87 at 3.)

### 13 **STANDARD OF REVIEW**

#### 14 *FLSA–Motor Carrier Exemption*

15 The FLSA provides that for all hours worked over forty for the workweek that  
16 employers pay employees at the rate of one and one-half times their regular rate. 29 U.S.C. §  
17 207(a)(1). The FLSA's overtime provision, however, is limited by certain statutory  
18 exemptions. In *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1468 (9th Cir. 1997), the court  
19 stated that the motor carrier exemption under 29 U.S.C. § 213(b)(1), is construed narrowly  
20 and the employer seeking the exemption has the burden of proving entitlement. *Id.* at 1469.  
21 Whether any shipment of goods is considered to be in interstate commerce is determined on  
22 an *ad hoc* basis. *Id.*

23 Under the motor carrier exemption, the FLSA exempts from its overtime requirements  
24 any employee over "whom the Secretary of Transportation has power to establish  
25 qualifications and maximum hours of service pursuant to the provisions of section 31502 of  
26 Title 49." 29 U.S.C. § 213(b)(1). An employee's exemption pursuant to § 213(b)(1)  
27 "depends both on the class to which his employer belongs and on the class of work involved  
28 in the employee's job." 29 C.F.R. § 782.2(a). Under the applicable regulation, the employee

1 must be (1) employed by an employer subject to the jurisdiction of the Secretary of  
 2 Transportation, and (2) “engage in activities of a character directly affecting the safety of  
 3 operation of motor vehicles in the transportation on the public highways of passengers or  
 4 property in interstate or foreign commerce within the meaning of the Motor Carrier Act.” *Id.*  
 5 The federal regulation identifies a driver as an occupation that directly affects the safety of  
 6 motor vehicles. *Id.*, § 782.2(b)(1) and (b)(2). The regulation defines driver as “an individual  
 7 who drives a motor vehicle in transportation which is, within the meaning of the Motor  
 8 Carrier Act, in interstate or foreign commerce.” *Id.*, § 782.3(a)

9                   *Partial Summary Judgment*

10                  “A party may move for summary judgment, identifying each claim or defense—or the  
 11 part of each claim or defense—on which summary judgment is sought.” Fed. R. Civ. P. 56(a)  
 12 A court must grant summary judgment if the pleadings and supporting documents, viewed  
 13 in the light most favorable to the nonmoving party, show “that there is no genuine issue as  
 14 to any material fact and the movant is entitled to judgment as a matter of law.” *Id.*; see  
 15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Jesinger v. Nevada Fed. Credit Union*,  
 16 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material.  
 17 See *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); see also *Jesinger*, 24 F.3d at  
 18 1130. “Only disputes over facts that might affect the outcome of the suit under the governing  
 19 law will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248.  
 20 The dispute must also be genuine, that is, the evidence must be “such that a reasonable jury  
 21 could return a verdict for the nonmoving party.” *Id.*; see *Jesinger*, 24 F.3d at 1130.

22                  A principal purpose of summary judgment is “to isolate and dispose of factually  
 23 unsupported claims.” *Celotex*, 477 U.S. at 323-24. Summary judgment is appropriate  
 24 against a party who “fails to make a showing sufficient to establish the existence of an  
 25 element essential to that party’s case, and on which that party will bear the burden of proof  
 26 at trial.” *Id.* at 322; see also *Citadel Holding Corp. v. Roven*, 26 F.3d 960, 964 (9th Cir.  
 27 1994). The moving party need not disprove matters on which the opponent has the burden  
 28 of proof at trial. See *Celotex*, 477 U.S. at 323. The party opposing summary judgment may

1 not rest upon the mere allegations or denials of the party's pleadings, but must set forth  
 2 "specific facts showing that there is a genuine issue for trial." See Matsushita Elec. Indus.  
 3 Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e) (1963)  
 4 (amended 2010)); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).  
 5 The non-movant's bare assertions, standing alone, are insufficient to create a material issue  
 6 of fact and defeat a motion for summary judgment. Anderson, 477 U.S. at 247-48.

## 7 DISCUSSION

### 8 *Employee or Independent Contractor*

9 In its motion for partial summary judgment, 3PD states its position that Montoya was  
 10 its independent contractor, not an employee of 3PD, and thus is not covered by the FLSA.  
 11 (Doc. 78 at 2.) 3PD then states, however, that even if Montoya is an employee of 3PD, "the  
 12 undisputed facts establish that as a driver in interstate commerce Montoya was exempt from  
 13 receiving overtime pay under the motor carrier exemption at 29 U.S.C. § 213(b)(1)." (Id.)

14 In its motion for partial summary judgment, 3PD has chosen not to argue and support  
 15 its position that Montoya was an independent contractor, other than to state its position and  
 16 offer a couple of citations. (Id. at 2, 4.) The Court will certainly not resolve an issue not  
 17 properly litigated and supported by its proponent. Therefore, the Court will only consider  
 18 whether under the FLSA's motor carrier exemption, Montoya, as an employee of 3PD, was  
 19 subject to the motor carrier exemption at 29 U.S.C. § 213(b)(1) and not entitled to overtime  
 20 compensation.

### 21 *Motor Carrier Exemption*

22 "Any motor carrier that engages in interstate commerce is subject to the Secretary of  
 23 Transportation's jurisdiction . . . and is thus exempt from the maximum hours provisions of  
 24 the FLSA." Reich v. Amer. Driver Serv., Inc., 33 F.3d 1153, 1155 (9th Cir. 1994). Montoya  
 25 concedes, except that he did not engage in interstate commerce, that he would be subject to  
 26 the jurisdiction of the Secretary of Transportation's other requirements. (Doc. 129 at 6.)  
 27 Therefore the issue before the Court is whether Montoya engaged in interstate commerce  
 28 when he delivered goods from the Kingman Home Depot store to Arizona customers without

1 traveling across state lines. If so, Montoya is subject to the Secretary of Transportation's  
2 jurisdiction and exempt from the overtime provisions of the FLSA pursuant to 29 U.S.C. §  
3 213(b)(1).

4 Citing Southern Pac. Transp. Co. v. ICC, 565 F.2d 615, 617 (9th Cir. 1977), 3PD  
5 argues that even a driver who remains entirely in one state still engages in interstate  
6 commerce if it is determined that the "shipper's fixed and persisting transportation intent at  
7 the time of the shipment" involves a continuous movement of freight from one state to  
8 another state. (Doc. 78 at 6-7.) 3PD contends that the Home Depot merchandise Montoya  
9 delivered within Arizona was part of a continuous movement of freight across state lines.  
10 (Id. at 7.) It is undisputed that the goods sold by Home Depot and delivered by Montoya  
11 were manufactured in several locations throughout the United States and Mexico. (Id.; see  
12 Doc. 87 at 2, Declaration of Bryan Ward, Director of Logistics for Home Depot.)  
13 Continuing, 3PD argues that the fact that the goods Plaintiff delivered may have stopped  
14 briefly at a Home Depot retail outlet or a RDC prior to delivery to its retail customers does  
15 not result in a break in the interstate movement of the goods. (Id. at 7-8.) 3PD contends that  
16 Montoya performed the last leg of the interstate deliveries to Home Depot's retail customers  
17 within Arizona and therefore was engaged in interstate commerce. (Id. at 8.)

18 Citing 29 C.F.R. § 782.7(b)(2), Montoya contends that because Home Depot, as the  
19 shipper, only moved the merchandise to a terminal storage point without a fixed and  
20 persistent transportation intent beyond the terminal storage point, there was no engagement  
21 in interstate commerce. (Doc. 129 at 3-4.) According to Montoya, normally Home Depot  
22 merchandise came from the manufacturer or supplier to the RDC, and then to the retail store,  
23 and only then was it loaded onto his truck for delivery. (Id. at 8.) Montoya argues that  
24 because he was delivering goods from the Home Depot retail store, not a warehouse, he was  
25 not engaged in interstate commerce. (Id. at 6.) Montoya contends that local intrastate  
26 deliveries from a retail outlet store do not involve the delivery driver in interstate commerce.  
27 (Id. at 7.) The Court disagrees.

28 Although not a reported case, the Court takes note of the similar factual analysis and

1 the persuasive legal reasoning contained in Ruiz v. Affinity Logistics Corp., No. CV 05-  
2 2125, 2006 WL 3712942 (S.D. Cal. Nov. 9, 2006). Similar to this case, Mr. Ruiz was a  
3 delivery driver who picked up Sears' merchandise from Sears' San Diego Market Delivery  
4 Operation and delivered the merchandise to the retail customer. The typical route from the  
5 manufacturers was to Sears' Direct Distribution Centers, then to local Market Delivery  
6 Operations, then out for delivery to the retail customer. Id. at \*1. At issue was whether Mr.  
7 Ruiz was subject to the Motor Carrier exemption at 29 U.S.C. § 213(b)(1). Id. It was  
8 undisputed that Mr. Ruiz did not make any out-of-state deliveries to retail customers. The  
9 court confronted the same issue in its case as this Court does, that being whether Mr. Ruiz's  
10 delivery of the final leg of Sears' merchandise from the San Diego Market Delivery  
11 Operation to the retail customer was a delivery made in interstate commerce. The Ruiz court  
12 turned to the seven factor evaluation put forward by the 1992 Interstate Commerce  
13 Commission ("ICC") Policy Statement ("Policy Statement") for analysis of the legal question  
14 regarding whether the delivery driver was engaged in interstate commerce. Id. at \*4. After  
15 consideration of the Policy Statement factors and applying them to the facts at issue, the Ruiz  
16 court concluded that Mr. Ruiz was subject to the Motor Carrier exemption. Id. at \*4-7.

17       The Court agrees with the reasoning of the Ruiz court and does not find Montoya's  
18 distinction between the San Diego Market Delivery Operation and the Kingman Home Depot  
19 dispositive; rather the Court finds similarity. Just as Mr. Ruiz picked up the final leg of the  
20 interstate delivery at the San Diego Market Delivery Operation to the retail customer, so  
21 Montoya picked up the final leg of the interstate delivery at the Kingman Home Depot to the  
22 retail customer. Just as Sears intended for its shipment from the manufacturer to continue  
23 in interstate commerce till it reached the retail customer, so also Home Depot manifested the  
24 same shipper's fixed intent—it intended for its shipment from the manufacturer to continue  
25 in interstate commerce till it reached the retail customer. See Klitzke, 110 F.3d at 1469  
26 (stating that whether transportation is interstate or intrastate is determined by the essential  
27 character of the commerce manifested by the "shipper's fixed and persisting transportation  
28 intent at the time of the shipment").

1       As in Ruiz, the Court finds that the 1992 ICC Policy Statement provides the  
 2 appropriate test for determining whether Montoya's deliveries engaged him in interstate  
 3 commerce. Policy Statement, Motor Carrier Interstate Transportation from Out-of-state  
 4 Through Warehouses to Points in Same State, 8 I.C.C.2d 470, 1992 WL 122949 (I.C.C. April  
 5 27, 1992). As made clear by the Supreme Court in Levinson v. Spector Motor Serv., 330  
 6 U.S. 649, 676-77 (1947):

7       [I]t is important to recognize that, by virtue of the unique provisions of §  
 8 13(b)(1) of the Fair Labor Standards Act, we are not dealing with an exception  
 9 to that Act which is to be measured by regulations which Congress has  
 10 authorized to be made by the Administrator of the Wage and Hour Division,  
 11 United States Department of Labor. [] Instead, we are dealing here with the  
 interpretation of the scope of the safety program of the Interstate Commerce  
 Commission, under § 204 of the Motor Carrier Act, which in turn is to be  
 interpreted in the light of the regulations made by the Interstate Commerce  
 Commission pursuant to that Act."

12 Id. The ICC Policy Statement sets forth seven factors to be evaluated in order to determine  
 13 whether the shipper has a "fixed and persistent transportation intent at the time of the  
 14 shipment" to have the shipment continue in interstate commerce to its ultimate destination.  
 15 See Clitzke, 110 F.3d at 1469.

16       Factor No. 1.

17       Although the shipper does not know in advance the ultimate destination of  
 18 specific shipments, it bases its determination of the total volume to be shipped  
 19 through the warehouse on projections of customer demand that have some  
 factual basis, rather than a mere plan to solicit future sales within the state.  
 This may include, but is not limited to, historical sales in the State, actual  
 present orders, and relevant market surveys of need.

20 Policy Statement, 1992 WL 122949 at \*2.

21       Home Depot is the shipper of the merchandise that comes from different  
 22 manufacturers located in different states and in Mexico. (Doc. 86 at 2-3.) It is undisputed  
 23 that Montoya delivered to customers building materials, appliances, and flooring that were  
 24 shipped from the manufacturer from various locations across the United States to the Home  
 25 Depot store located in Kingman. (Doc. 84 at 7-8; Doc. 132 at 10; Docs. 132-1and 132-2.)  
 26 Based on the declaration of Mr. Waters, former Home Depot Senior Manager over direct to  
 27 customer platforms, Home Depot remote stores like Kingman carry a limited amount of  
 28

1       appliances, windows, and flooring in stock for sale to retail customers. (Doc. 86 at 3.) When  
2       a customer purchases an appliance not in stock, Home Depot sends an electronic order to the  
3       manufacturer. (Id.) For a remote store like Kingman, purchased appliances are shipped from  
4       the manufacturers directly to the stores where the appliances were purchased for pick up by  
5       third-party logistics providers such as Montoya for delivery to the Home Depot customers.  
6       (Id.) When a customer purchases windows or flooring not in stock at a remote store, Home  
7       Depot sends an order to the manufacturer for the purchased windows or flooring and  
8       purchased windows and flooring are shipped from the manufacturers directly to the store  
9       where they were purchased for pick up by third-party logistics providers for delivery to the  
10      Home Depot customer. (Id. at 3-4.)

11           Home Depot stores may sell appliances, windows, and flooring to its customers once  
12       the manufacturers give Home Depot a release date (i.e., a date that the newly-manufactured  
13       goods are available for shipment by Home Depot to its stores). Many sales occur on  
14       appliances, windows, and flooring that have a release date but are still on the manufacturers'  
15       production line, while other sales occur on appliances, windows, and flooring that are in  
16       transit to the stores from the manufacturer. (Id. at 4.)

17           According to Mr. Waters, the Kingman Home Depot store received daily truckloads  
18       of goods. Each day reports were reviewed to determine whether there are goods on  
19       recently-arrived trailers that are late or could become late for delivery because of a pending  
20       order to be filled for those goods. Those pending orders may include appliances, windows,  
21       or flooring that have already been sold and designated for delivery to the Home Depot  
22       customer. (Id. at 5; see also Declaration of Bryan Ward, Home Depot Director of Logistics,  
23       Doc. 87 at 3.)

24           Mr. Waters further stated that with respect to appliances, windows, and flooring that  
25       were not already designated for specific customers, Home Depot places its orders based on  
26       forecasting of the sales to be made by the retail stores. These forecasts are based on historical  
27       sales information, seasonal trends, and anticipated promotional events. (Doc. 86 at 5.)

28           This first factor weighs in favor of a finding that the merchandise delivered by

1 Montoya was delivered as part of a continuous movement in interstate commerce. For remote  
 2 stores like Kingman, when an purchased item (appliance, windows or flooring) was not in  
 3 stock, Home Depot ordered the item and had it shipped to the store, where delivery persons  
 4 such as Montoya delivered it to the retail customer. 3PD submitted documents in support  
 5 showing Montoya delivering over 400 appliances in the first quarter of 2011. (Docs. 132-1  
 6 and 132-2).<sup>2</sup> It is Home Depot's fixed intent at the time shipments such as these are made  
 7 from the manufacturer that they continue in interstate commerce to the retail customer.

8 Furthermore, sales occur on appliances, windows, and flooring that have a release date  
 9 but are still on the manufacturers' production line, while other sales occur on appliances,  
 10 windows, and flooring that are in transit to the stores from the manufacturer.

11 In addition, Home Depot places its orders with manufacturers based on forecasting  
 12 of the sales to be made by a retail store such as Kingman. These forecasts are based on  
 13 historical sales information, seasonal trends, and anticipated promotional events. Thus, such  
 14 forecasts by Home Depot have a factual basis, and are not a mere plan to solicit sales within  
 15 the State.

16 Factor No. 2.

17 No processing or substantial product modification of substance occurs at the  
 18 warehouse or distribution center. However, repackaging or reconfiguring  
 (secondary packaging) may be performed.

19 Policy Statement, 1992 WL 122949 at \*2. Home Depot does not process or repack the  
 20 appliances, windows, and the flooring. They are delivered to the customers in the same way  
 21 they were received from the manufacturers. (Doc. 86 at 4.) Thus, this factor also weighs in  
 22 favor of a continuous movement in interstate commerce.

23 Factor No. 3.

24 While in the warehouse, the merchandise is subject to the shipper's control and  
 25 direction to the subsequent transportation.

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27                   <sup>2</sup>Certainly such a level of participation by Montoya in deliveries meets 3PD's burden  
 28 to establish that a plaintiff participated in more than a *de minimis* level of interstate activity.  
 See Reich, 33 F.3d at 1156.

1     Policy Statement, 1992 WL 122949 at \*2. Mr. Ward stated that the appliances, windows,  
2 and flooring are subject to Home Depot's direction with respect to transportation. Home  
3 Depot arranges for the transportation of the goods from manufacturers to its stores or  
4 third-party logistics providers' facilities for delivery to the retail customer. (Doc. 87 at 3.)  
5 Thus, this factor also weighs in favor of a continuous movement in interstate commerce.

6       Factor No. 4.

7       Modern tracking systems allow tracking and documentation of most, if not all  
8 of the shipments coming in and going out of the warehouse or distribution  
center.

9     Policy Statement, 1992 WL 122949 at \*2. Home Depot can track appliances, windows, and  
10 flooring from the time it orders the goods from the manufacturer through delivery to its retail  
11 customers. (Docs. 87 at 3; 86 at 5.) According to both Mr. Ward and Mr. Waters, Home  
12 Depot tracks its shipments through to delivery to the retail customer. Thus, this factor also  
13 weighs in favor of a continuous movement of the merchandise in interstate commerce.

14       Factor No. 5.

15       The shipper or consignee must bear the ultimate payment for transportation  
16 charges even if the warehouse or distribution center directly pays the  
transportation charges to the carrier.

17     Policy Statement, 1992 WL 122949 at \*2. Mr. Ward stated that Home Depot is responsible  
18 for and pays the transportation costs incurred for some appliances, windows, and flooring to  
19 be shipped from the manufacturers to the customers. (Doc. 87 at 3.) Thus, this factor also  
20 weighs in favor of a continuous movement in interstate commerce.

21       Factor No. 6.

22       The warehouse utilized is owned by the shipper.

23     Policy Statement, 1992 WL 122949 at \*2. Home Depot owns the stores and RDC's through  
24 which its merchandise moves. (Doc. 87 at 2.) Thus, this factor also weighs in favor of a  
25 continuous movement in interstate commerce.

26       Factor No. 7.

27       The shipments move through the warehouse pursuant to a storage in transit  
tariff provision.  
28

1     Policy Statement, 1992 WL 122949 at \*2. Neither party discussed this factor, so it is neutral.

2                 In summary, each of the first six factors demonstrates that Montoya's delivery of the  
 3 Home Depot goods at issue was the last leg in a continuous movement in interstate  
 4 commerce. Neither party discussed the final factor, so it is neutral. Therefore, Montoya's  
 5 transportation of merchandise from the Kingman Home Depot to Home Depot customers was  
 6 as a matter of law a transportation in interstate commerce. Montoya's deliveries were the last  
 7 leg of the interstate shipment of the merchandise from the manufacturers to the retail  
 8 customer. Consequently, Montoya is subject to the motor carrier exemption under 29  
 9 U.S.C. § 213(b)(1), and is not entitled to overtime pay under the FLSA.

10                 *Unjust Enrichment*

11                 A claim for unjust enrichment may exist where a person confers a benefit to his  
 12 detriment on another and allowing the other to retain that benefit would be unjust. USLife  
 13 Title Co. of Ariz. v. Gutkin, 152 Ariz. 349, 354, 732 P.2d 579, 584 (App. 1986). To prevail  
 14 on an unjust enrichment claim, a plaintiff "must show: (1) an enrichment; (2) an  
 15 impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the  
 16 absence of justification for the enrichment and the impoverishment; and (5) the absence of  
 17 a legal remedy." Trustmark Ins. Co. v. Bank One, Ariz. NA, 202 Ariz. 535, 541, 48 P.3d  
 18 485, 491 (App. 2002). Where a specific contract exists between the parties, the doctrine of  
 19 unjust enrichment is unavailable. Id. at 542, 48 P.3d at 492; see also Brooks v. Valley Nat.  
 20 Bank, 113 Ariz. 169, 174, 548 P.2d 1166, 1171 (1976). This is because the essence of an  
 21 unjust enrichment claim is that there is no direct relationship between the parties under which  
 22 the plaintiff may recover. "In the absence of law to the contrary, Arizona generally follows  
 23 the Restatement." Hunnicutt Constr., Inc. v. Stewart Title and Trust of Tucson Trust No.  
 24 3496, 187 Ariz. 301, 306 n.6, 928 P.2d 725, 730 n.6 (App. 1996). Thus, the Court will rely  
 25 on the Restatement in its examination of Montoya's unjust enrichment claim.

26                 Here, the facts are undisputed. 3PD and Big Dog, solely owned by Montoya, have  
 27 a contractual relationship with one another. Big Dog and 3PD entered into and executed a  
 28 DSA which governed their employment relationship. (See, e.g., Doc. 79-1 at 6-24.) The

1 DSA specifies how Big Dog will be compensated for delivery services for Home Depot.  
2 Montoya concedes that the DSA exercises an enormous amount of control over himself and  
3 his performance under the contract. (Doc. 129 at 5 n.1.) The contractual relationship  
4 between the parties remains in full force and effect unless and until it is found inapplicable  
5 for some reason such as being a contract of adhesion, as void against public policy, or some  
6 other unenforceable reason. Under Arizona law, Montoya’s unjust enrichment claim is not  
7 available so long as a specific contract between the parties governs compensation for work  
8 performed. See Trustmark Ins. Co., 202 Ariz. at 542, 48 P.3d at 492.

However, even when the Court assumes that the DSA is unenforceable and that Montoya is an employee rather than an independent contractor, the Restatement (Third) of Restitution and Unjust Enrichment § 32 holds that “[t]here is no unjust enrichment if the claimant receives the counterperformance specified by the parties’ unenforceable agreement.” Id., § 32(2). There is no allegation that 3PD has failed to perform under its understanding of its payment responsibilities to Big Dog, and thus to Montoya. Thus, even if the Court found that the DSA was void, under the Restatement, as a matter of law Montoya cannot succeed on his unjust enrichment claim.

17 The Court finds persuasive Scovil v. FedEx Pkg. System, Inc., No. CV 1:10-515, 2011  
18 WL 2968350, \*2 (D. Me. July 21, 2011), where FedEx delivery drivers alleged that they had  
19 been misclassified as independent contractors rather than employees. Construing and  
20 applying Restatement (Third) of Restitution and Unjust Enrichment § 32(2), the court held  
21 that even if the drivers' independent contract agreements were void due to public policy, the  
22 drivers could not succeed on an unjust enrichment claim because FedEx had already  
23 performed under the agreement. Id.

24 In this case, the Court makes the same determination. The facts are undisputed and  
25 as a matter of law, Montoya cannot succeed on his unjust enrichment claim.

## CONCLUSION

27 || Accordingly, on the basis of the foregoing,

28 IT IS HEREBY ORDERED granting in part and denying without prejudice in part

1 || Defendant 3PD's motion for partial summary judgment. (Doc. 77.)

2           **IT IS FURTHER ORDERED** granting 3PD's motion for partial summary judgment  
3 regarding Montoya's claim that he is entitled to overtime compensation under the FLSA. The  
4 Court finds that pursuant to the FLSA's Motor Carrier exemption, 29 U.S.C. § 213(b)(1),  
5 Montoya is not entitled to overtime compensation. Montoya's claim for overtime  
6 compensation under the FLSA is dismissed.

7           **IT IS FURTHER ORDERED** granting 3PD's motion for partial summary judgment  
8 regarding Montoya's claim for unjust enrichment. Montoya's claim for unjust enrichment  
9 is dismissed.

10       **IT IS FURTHER ORDERED** denying without prejudice 3PD’s motion for partial  
11 summary judgment regarding Montoya’s claim that 3PD violated the FLSA’s minimum wage  
12 provisions. 3PD may renew its motion for partial summary judgment regarding Montoya’s  
13 claim that 3PD violated the FLSA’s minimum wage provisions following a supplemental  
14 Rule 16 scheduling conference on Montoya’s remaining claims.

15 DATED this 30th day of March, 2015.

Stephen W. McDonald

Stephen M. McNamee  
Senior United States District Judge